



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Theories of domination and Labour Law

Citation for published version:

Cabrelli, D & Zahn, R 2017, 'Theories of domination and Labour Law: An alternative conception for intervention?', *International Journal of Comparative Labour Law and Industrial Relations*, vol. 33, no. 3, pp. 339-364. <<http://www.kluwerlawonline.com/abstract.php?area=Journals&id=IJCL2017015>>

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

International Journal of Comparative Labour Law and Industrial Relations

Publisher Rights Statement:

Copyright © 2017 Kluwer Law International
All rights reserved

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



Theories of Domination and Labour Law: An Alternative Conception for Intervention?

David Cabrelli and Rebecca Zahn***

1. Introduction

In previous work, the authors sought to demonstrate how a particular strand of political theory could be usefully adopted to shed valuable light on labour law.¹ In short, the conception of ‘non-domination’ grounded in contemporary civic republican political philosophy and associated with scholars such as Philip Pettit and Frank Lovett² lays down sophisticated accounts of (i) freedom and (ii) a socially just order. In this framework, (i) freedom, according to Pettit, and (ii) social justice, in Lovett’s version of this theory, is secured when laws and policies are introduced to subject private social relationships characterised by dependency and an arbitrary imbalance in social power to a measure of effective external controls. As a subset of a socially just order, the previous work of the authors sought to sketch out how Lovett’s incarnation of non-domination theory had the potential to act as a coherent justification for labour laws. This conception would regard labour laws as a set of measures that are designed to achieve a degree of ‘non-domination’ in the employment relationship. Labour law could achieve this by introducing legal and policy controls limiting the employee’s dependence on his/her employer and restricting the arbitrary power imbalance inherent in the relationship between the employer and the employee. By serving to tone down the level of arbitrary decision-making vested in the employer, the dependency of the employee on the employer, and/or by counterbalancing the degree of power wielded by the employer, it was argued that procedural and substantive labour laws such as unfair dismissal, minimum wage laws, working time controls, and collective labour and trade union rights could well be perceived as measures that are consistent with a legal framework designed to secure a degree of ‘non-domination’ of the worker.

To that extent, this article builds on the exposition of the position put forward by the authors in a prior paper.³ Yet, where it represents a marked departure from that previous work is in the diffidence (at best), and scepticism (at worst), with which it confronts the non-domination thread of civic republicanism as a rationale for labour law, as well as in the level of engagement with that theory in terms of a sustained evaluation of its strengths and weaknesses as a

* Senior Lecturer in Commercial Law, University of Edinburgh.

** Senior Lecturer in Law, University of Strathclyde. The authors would like to thank the workshop participants, Guy Davidov and an anonymous reviewer for helpful comments on earlier versions of this article. The usual disclaimers apply.

¹ D. Cabrelli and R. Zahn, “Civic Republican Political Theory and Labour Law: A Sketch”, Edinburgh School of Law Research Paper No. 2017/11, available at SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2967401 (last visited 29 May 2017).

² F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010).

³ D. Cabrelli and R. Zahn, “Civic Republican Political Theory and Labour Law: A Sketch”, Edinburgh School of Law Research Paper No. 2017/11, available at SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2967401 (last visited 29 May 2017).

justificatory account for the subject. As such, the purpose of this exercise is to summarise the various advantages of non-domination theory as a justification for labour laws before moving on to test rigorously the purchase of this model by addressing the range of objections that can be levelled at it as a justificatory framework. Overall, the paper recognises the limits inherent in the application of civic republican non-domination theories of political philosophy to labour law (see, in particular, section 4 on ‘transplantability’). More pertinently, the prescriptions for relationships blighted by domination that are suggested by Lovett and Pettit are arguably lacking in ambition and could be much more radical. An ancillary point to make at the outset is that rather than attempt to cast doubt on, or critique, other key accounts for the subject, this paper does not claim that non-domination provides an exhaustive account so that it ought to be treated as the exclusive value that labour laws ought to promote. Instead, the argument is presented within a spirit favouring the co-existence of different goals for the discipline, whether selective or universal in their nature.⁴ This endeavour will be pursued primarily within the context of UK labour laws.

Section 2 provides a distillation of non-domination theory and explains how it can *prima facie* account for labour laws. Section 3 sketches out some of the merits of such an approach, whilst section 4 moves on to engage in a comprehensive evaluation of the objections. Finally, section 5 concludes, with the general proposition that although Pettit’s and Lovett’s non-domination model is insufficient to act as an abstract justificatory theory for labour laws, it can act as a driver for specific labour laws; and more specifically, for a particular conception or form of labour law that promotes a distinctive set of regulatory techniques, and vision of the role and function of the central notion of the contract of employment. The primary significance of this article rests in the insight that domination-based narratives of civic republicanism have the capacity to act as a bridge between existing individual, relational, autonomous, substantive and procedural accounts of the regulation of the law of the contract of employment⁵ and political philosophy: a ‘new normativity’,⁶ albeit one that is restricted in scope.

2. ‘Non-domination’ Theory Distilled

Commentators have stressed the importance of injecting clarity into the objectives and goals that labour laws are formulated to meet and achieve.⁷ Once these purposes have been clarified,

⁴ G. Davidov, *A Purposive Approach to Labour Law* (Oxford, OUP, 2016) 68-71, G. Davidov, ‘Setting Labour Law’s Coverage: Between Universalism and Selectivity’ (2014) 34 *Oxford Journal of Legal Studies* 543 and L. Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (Cheltenham, Edward Elgar, 2016) 41-45 and 92-93.

⁵ D. Brodie, ‘How Relational is the Employment Contract?’ (2011) 40 *Industrial Law Journal* 232 and D. Brodie, ‘Relational Contracts’ in M. Freedland et al (eds), *The Contract of Employment* (Oxford, OUP, 2016) 145

⁶ A. Bogg, ‘Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?’ (2017) [x] *International Journal of Comparative Labour Law and Industrial Relations* [xxx].

⁷ G. Davidov, ‘The (Changing?) Idea of Labour Law’ (2007) 146 *International Labour Review* 311, H. Collins, ‘Theories of Rights as Justifications’ in G. Davidov and B. Langille (eds.), *The Idea of Labour Law* (Oxford, OUP, 2011) 137, G. Davidov, ‘Articulating the Idea of Labour Law: Why and How’ (2012) 3 *European Labour Law Journal* 130, and G. Davidov, *A Purposive Approach to Labour Law* (Oxford, OUP, 2016) 13-33.

it becomes more straightforward to identify the justifications that ought to be invoked in favour of the discipline, as well as its distinctive attributes providing support for its treatment as an autonomous field of law and study.⁸ The authors have suggested in previous work that by drawing on the diverse methods, analytical approaches and schools of thought employed in civic republican philosophy, labour lawyers can illuminate their subject and discover fresh insights. Engagement with civic republicanism also has the capacity to inform and enhance the study of the discipline. By approaching labour law from a political philosophical perspective, this technique follows a well-trodden path insofar as labour law traditionally has always been treated as a contextual field of study, albeit possessing its own autonomy and internal logic as a legal subject.⁹ That is to say that the tendency in the past has been for labour law to be viewed through a sociological prism as a means of improving our understanding of the subject, thus underscoring its interdisciplinary credentials.¹⁰ In recent years, the sociological and anthropological approach to labour law study exemplified by classic scholars such as Sinzheimer and Kahn-Freund has waned,¹¹ and been replaced to some extent by other frameworks, e.g. the ‘law of the labour market’ account.¹² This piece is partly motivated by a desire to view the subject within an alternative contextual frame, namely one that is rooted in a political and democratic frame of reference rather than an anthropological, economic or sociological setting.

The civic republican agenda contains a number of diverse strands with a broad range of proponents. Hence, there is no single or uniform account. There are, however, two main schools of thought. First, theorists such as Philip Pettit and Frank Lovett advance a model which is based entirely on a particular conception of the notion of ‘domination’. Pettit defines the concept of ‘freedom’ against that principal value, as does Lovett in the case of the idea of ‘social justice’. In essence, ‘freedom’ and ‘social justice’ are conceptualised as conditions that demand ‘non-domination’. As such, a situation where A is not ‘dominated’ by B will result in A’s ‘freedom’ according to Pettit, or A being situated in a socially just legal order in terms of

⁸ G. Davidov, ‘Setting Labour Law’s Coverage: Between Universalism and Selectivity’ (2014) 34 *Oxford Journal of Legal Studies* 543, 547–9, A. Bogg, C. Costello, A. C. L. Davies and J. Prassl, ‘Labour Law’s Autonomy: Theory and Methodology’ in A. Bogg, C. Costello, A. C. L. Davies, J. Prassl (eds), *The Autonomy of Labour Law* (Hart 2015) 1, M. Freedland, ‘Otto Kahn-Freund, the Contract of Employment and the Autonomy of Labour Law’ in A. Bogg, C. Costello, A. C. L. Davies, J. Prassl (eds), *The Autonomy of Labour Law* (Hart 2015) 29 and H. Collins, ‘Contractual Autonomy’ in A. Bogg, C. Costello, A. C. L. Davies, J. Prassl (eds), *The Autonomy of Labour Law* (Hart 2015) 45.

⁹ H. Collins, ‘Contractual Autonomy’ in A. Bogg, C. Costello, A. C. L. Davies, J. Prassl (eds), *The Autonomy of Labour Law* (Hart 2015) 45, 50–52.

¹⁰ For example, the once-pervasive ‘collective laissez-faire’ paradigm for the discipline in the UK: O. Kahn-Freund, ‘Legal Framework’ in A. Flanders and H. Clegg, *The System of Industrial Relations in Great Britain* (Basil Blackwell, Oxford, 1954) 42, 53 and O. Kahn-Freund, ‘Labour Law’ in *Law and Opinion in England in the 20th Century* (London, Stevens, 1959).

¹¹ M. Freedland, ‘General Introduction – Aims, Rationale, and Methodology’ in M. Freedland et al (eds), *The Contract of Employment* (Oxford, OUP, 2016) 6–11 and R. Dukes, *The Labour Constitution* (Oxford, OUP, 2015) 104–108.

¹² S. Deakin, ‘A New Paradigm for Labour Law? A Review of C. Arup, P. Gahan, J. Howe, R. Johnstone, R. Mitchell, A. O’Donnell (eds.), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Sydney, The Federation Press, 2006)’ (2007) 31 *Melbourne University Law Review* 1161, 1170–1171 and S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford, OUP, 2005).

Lovett's model. Lovett's and Pettit's descriptive conceptualisations of 'domination' as a phenomenon are both robust enough, although subject to certain modifications suggested below. Although both Pettit and Lovett adopt a sophisticated account of the scope of economic domination, neither calls for any significant re-organization of workplaces, the labour market or worker or political control of productive resources in order to minimize the level of managerial domination at work. In fact, Lovett's prescription for the reduction of domination - which is based on the conferral of a universal and unconditional basic income, a frictionless right to quit employment and the operation of the free market - is arguably inadequate and potentially deregulatory of labour law, whilst Pettit's approach is equivocal and tepid as regards the desirability of collective labour laws such as the law of industrial action and the right to strike.¹³ For that reason, whilst Lovett's and Pettit's models of 'domination' are accepted, it is assumed in this paper that their prescriptions are rejected.

The second main incarnation of civic republican thought is workplace republicanism. This formulation advances a more radical and socially progressive agenda for workplace governance and the labour market and is associated with thinkers such as Gourevitch,¹⁴ Anderson,¹⁵ Hsieh,¹⁶ González-Ricoy¹⁷ and Schuppert.¹⁸ Each of the workplace republicans, to a greater or lesser extent, offer up a normative case for restructuring how the workplace is organised and governed, as a means of toning down managerial authoritarianism. In this article, the focus is on the first, and most mainstream and prominent, strand of civic republican thought, i.e. the account of domination encountered in the thinking of Pettit and Lovett, rather than the competing conception adhered to by workplace republicans, which is the subject of a separate paper by Keith Breen in this special issue.

The conception of non-domination as 'freedom' and 'social justice' within Pettit's and Lovett's accounts of civic republication theory provides an opportunity to once again stress the contextual credentials of labour law as a subject, i.e. by testing the subject's relationship with political thought. Both Pettit's and Lovett's models are political theories that prize the mitigation of domination. In this paper, however, Lovett's framework is used as the relevant proxy for analysis, since it arguably supplies a definition of 'domination' that is richer and more refined than that of Pettit: in particular, Lovett includes the "dependency" variable (2) below as a key element of his definition of "domination", as well as a slightly different understanding of arbitrary power in respect of the "arbitrariness" variable (3) below..¹⁹ Lovett posits that domination

¹³ A. Bogg, "Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?" (2017) [x] *International Journal of Comparative Labour Law and Industrial Relations* [xxx].

¹⁴ See A. Gourevitch, 'Labor and republican liberty' (2011) 18 (3) *Constellations* 431–54 and A. Gourevitch, 'Labor republicanism and the transformation of work' (2013) 41 (4) *Political Theory* 591–617.

¹⁵ E. Anderson, 'Equality and freedom in the workplace: recovering republican insights' (2015) 31 (2) *Social Philosophy and Policy* 48–69.

¹⁶ N.-H. Hsieh, 'Rawlsian justice and workplace republicanism' (2005) 31(1) *Social Theory and Practice* 115–42.

¹⁷ I. González-Ricoy, 'The republican case for workplace democracy' (2014) 40(2) *Social Theory and Practice*, 232–54.

¹⁸ F. Schuppert, 'Being equal: analysing the nature of social egalitarian relationships' in C. Fourie, F. Schuppert, and I. Wallimann-Helmer, eds. *Social Equality: on what it means to be equals*. Oxford: Oxford University Press, 2015, 107–25

¹⁹ Contrast F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 9, 119–123 and chapters 2 to 4 with P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, OUP, 1999) 52–56, P. Pettit, "Freedom in the Market" (2006) 5 *Politics, Philosophy and Economics* 131, 138 and P. Pettit, *On the People's*

will be present where there is an arbitrary imbalance in power in the context of a dependent private ‘social relationship’.²⁰ As such, there are three variables present in this formulation in the sense that domination reigns over A if:

- (1) an imbalance in the distribution of social, coercive, or market power operates in favour of B insofar as B exerts greater coercive social or market power over A than A wields over B (the “power imbalance” variable);²¹
- (2) A must be dependent on his/her private social relationship with B to some extent (the “dependency” variable);²² and
- (3) the structure of the relationship between A and B must entail B being afforded the discretion to exercise power over A in an arbitrary fashion, i.e. to the extent that that power can be exercised without any effective or external constraints (the “arbitrariness” variable).²³

Before we develop this line of thought any further, we must first broach the question of the descriptive accuracy of this model within the context of employment. In other words, is it accurate to depict the employment relationship as one that is generally characterised by domination in the absence of any external or effective legal or policy controls? Alternatively, does it offer little more than Kahn-Freund’s classic ‘inequality of bargaining power’²⁴ account?²⁵ Subject to the criticisms further discussed in section 4 below, it is suggested that, in the abstract, the employment relationship can undoubtedly be cast as one that is tainted by ‘domination’; in particular, to the extent that – *in its natural state and as such, in the absence of labour laws prescribed by the common law or employment protection legislation that promote or protect the interests of the employee*²⁶ – the employment relationship subjects an employee to the exercise of market and social power at the hands of his/her employer via the managerial prerogative, which largely outweighs any power he/she may enjoy over the employer. Hence, the power imbalance variable (1) above is satisfied. Of course, the common law via the implied terms of the employment contract (such as the duty of fidelity and loyalty, the duty to follow reasonable instructions, etc.) function to support the interests of the employer in terms of its exercise of the managerial prerogative. Nonetheless, in the absence of such

Terms: A Republican Theory and Model of Democracy, (Cambridge, CUP, 2012) chapter 1. However, Lovett’s reform agenda to achieve non-domination is arguably overly restrained.

²⁰ For a trenchant criticism of Lovett’s approach to ‘social relationships’, see A. Bogg, “Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?” (2017) [x] *International Journal of Comparative Labour Law and Industrial Relations* [xxx].

²¹ F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 74-78 and 120.

²² F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 34-40, 49-52 and 120.

²³ F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 95-101 and 120.

²⁴ P. Davies and M. Freedland (eds), *Kahn-Freund’s Labour and the Law*, 3rd edition (London, Stevens, 1983) 18.

²⁵ For the interesting links between civic republican thought and inequality of bargaining power, see the discussion in S. White, “The Republican Critique of Capitalism” (2011) 14 *Critical Review of International Social and Political Philosophy* 561, 565-567.

²⁶ For a critique of the tendency of political theories to invoke concepts such as the ‘natural state’ or ‘original position’, particularly within the context of labour relationships, see section 4 below.

implied terms, it is submitted that the bureaucratic power inherent in the employer's organisation that envelops the employment relation within an overarching authoritarian structure²⁷ - also known as the managerial prerogative - is sufficient of itself to establish a hierarchical power dynamic by which the employee is bound to conform to the employer's practical authority that satisfies variable (1) above.

The dynamics of the managerial prerogative also function to enable the employer to exercise a measure of arbitrary control over the employee, i.e. the arbitrariness variable (3) above: in shorthand, the state or condition of the employee²⁸ is largely responsible for the satisfaction of these two factors (1) and (3) above that are necessary for the establishment of a relationship characterised by domination. Of course, labour laws, through techniques involving the imposition of managerial duties to listen or consult and go through due process (prior to formal decision-making), unfair dismissal laws and the implied term of good faith or mutual trust and confidence, are designed to offset or temper such arbitrary discretion. As such, one might object that, by definition, in such a case, there can be no domination in the employment relationship, as the requisite arbitrariness component (3) has been removed or minimised. However, of course, at this stage we are exploring the position of the employee in the abstract, where such protective common laws or legislation are absent. Hence, in such a context, the employment relationship is in its raw and unembellished state, with employees faced by the managerial prerogative reflecting the practical authority and interests of the employer. Another potential difficulty with the inclusion of the arbitrariness factor (3) – whereby a party to a relationship is subject to the will or pleasure of the other party to the relationship, without any effective or external constraints²⁹ – concerns its over-inclusivity inasmuch as it could conceivably cover a multitude of market transactions. In this sense, the criticism is that the formulation is too broad and can be treated as of little utility for labour law. This objection can be addressed on two grounds. First, it should be stressed that Lovett's framework is concerned with the promotion of a form of social justice in a broad range of strategic social relationships characterised by domination. In other words, it is not confined to labour relationships. If we think of labour laws as a set of regulatory techniques that minimise management's entitlement to arbitrarily interfere in the labour relationship, we can think of the discipline as a subset of a broader legal and political order that is socially just. This explains the breadth of the arbitrary discretion variable (3). Secondly, it is important to recall the point that there is no 'domination' unless the arbitrariness variable (3) is accompanied by the (1) power imbalance and (2)

²⁷ Hugh Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment (1986) 15 *Industrial Law Journal* 1.

²⁸ Of course, this is traditionally referred to as 'subordination' in the labour law literature.

²⁹ There is a criticism that the 'without any effective or external constraints' element of the arbitrariness variable would signify an absence of domination – and as such, no justification for labour laws – if an employee has advance knowledge of the rules and conventions applicable to the employer's behaviour. In this way, Lovett's domination model is narrower than it needs to be for the purposes of labour law. This objection also reflects Lovett's procedural, rather than substantive conceptualisation of the arbitrariness variable (3) above (see F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 112-119), on which, see A. Bogg, "Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?" (2017) [x] *International Journal of Comparative Labour Law and Industrial Relations* [xxx]. It can be addressed in two ways: first, by modifying Lovett's scheme to remove the 'without any effective or external constraints' element so that the arbitrariness variable (3) above hinges exclusively on the 'will or pleasure' factor; or, secondly by adopting Bogg's approach which involves the substitution of Lovett's procedural incarnation of the arbitrariness factor (3) for a substantive one.

dependency variables, i.e. arbitrary power in a market exchange, of itself, whilst necessary, is not sufficient for that relationship to be characterised by domination. In other words, although a market exchange may be tainted by arbitrariness in favour of B, a party A will not be dominated by B in the absence of a power imbalance (variable (1) above) in favour of B or dependency (variable (2) above) on the part of A on his/her relationship with B.

Finally, if we turn to element (2) above, the average employee is clearly dependent on his/her employer. For instance, the employee will generally need to continue the specific relationship with the employer for subsistence reasons, owing to the basic inability to spread his/her risks amongst a suite of different employers, or simply because the costs of exiting his/her job are too high. Although certain labour laws such as minimum wage prescriptions can reduce such financial dependency, in the absence of such laws, the position of the worker is particularly susceptible to poverty wages or remuneration below the living wage.

One of the problematical effects of casting dependency as an essential element of domination is that a high level of dependency of an employee on an employer in an employment relationship is portrayed in an adverse light, when in fact it might be useful in order to establish a degree of trust and security. Seen from this perspective, it might be considered misconceived to depict dependency as a negative feature. Moreover, there is some force in the contention that dependency is a separate vulnerability, rather than a precondition for domination, e.g. that a power imbalance (1) above and arbitrariness (3) above, should be sufficient to constitute domination.³⁰ An additional difficulty with Lovett's approach to dependency is that by predicating it on the notion of employees' exit costs, it will not exist where the employee's freedom to quit or exit the relationship can be exercised by the employee without sustaining any adverse toll on a frictionless basis. The cost of the employee's exit (and, so, the level of dependency on the relationship) is calculated in terms of the degree to which his engagement in the social relationship with the employer is involuntary. This is equated to the net expected costs of exit, i.e. (1) the overall value of the existing position judged from the employee's subjective viewpoint, less (2) the overall value of the next best job in the labour market, plus (3) the transaction costs and risks of the employee moving from the existing position to the alternative one.³¹ As such, the 'typically high displacement',³² financial, psychological, emotional and other costs³³ of the individual employee exiting the social relationship operate as a deterrent from him/her doing so. Nevertheless, it is possible that there will always be a measure of exit costs in all cases, since social, psychological and other factors – which will often be high – have to be factored into account, albeit that they are a challenge to gauge. For this reason, some modification to Lovett's scheme is suggested and the 'inability to spread risks' and other sociological factors (i.e. not merely financial risks/costs and rewards) are adopted instead as the basis for the dependency variable.

³⁰ See the recommendations in G. Davidov, "Subordination v Domination: Exploring the Differences" (2017) [x] *International Journal of Labour Law and Industrial Relations* [x] and A. Bogg, "Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?" (2017) [x] *International Journal of Comparative Labour Law and Industrial Relations* [xxx].

³¹ F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 39-40 and 50.

³² M. Moore, "Reconstituting Labour Market Freedom: Corporate Governance and Collective Worker Counterbalance" (2014) 43 *Industrial Law Journal* 398, 416 and M. Moore, *Corporate Governance in the Shadow of the State* (Oxford, Hart, 2013) 45-49.

³³ F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 39-40.

Pursuant to this modified domination-based framework, labour laws would be perceived as a set of interlinked principles and rules that aim to reduce the domination of an employee within the context of a specific employment relationship. This reformulation would cast labour laws as rules crafted in order to (1) subject the employer's discretion to exercise its powers of direction and co-ordination at its will or pleasure, as well the degree of subordination of the employee, to external and effective constraints, (2) level down the degree of dependency of the employee on the employer by modifying the operation of the labour market and the specifics of their particular relationship, and/or (3) adjust the level of arbitrary discretion enjoyed by the employer by subjecting it to limitations. This normative construction of the role of labour law in minimising domination is at odds with that of Lovett and Pettit (although the latter to a lesser extent). Lovett's scheme supplies a useful definition of 'domination' as a concept, but it is the set of policy prescriptions that he proposes – comprising a universal and unconditional basic income, the safeguarding of a free labour market and an effective right to quit employment including rules limiting or prohibiting restrictive covenants, garden leave and arguably some unfair dismissal, wrongful dismissal and redundancy laws (as a means of freeing up, and lowering the cost of hires for employers) – that envisages a restricted body of, and bankrupt role for, labour laws.³⁴ Instead, under the authors' framework, it is assumed that social dependency and arbitrariness are lowered, and the employer's social power is constrained, by employment laws, thus generating the minimisation of domination and more redistributive arrangements in the employment relationship.

3. *The strengths of non-domination theory*

We now take the step of abstracting non-domination theory from the civic republican tradition and assess its general potential as an instrument to further the normative claims for labour laws. By doing so, we can identify several factors that may commend it as a justificatory account.

Promotion of substantive and procedural fairness

Lovett's account of a socially just order can be understood as one that promotes the promulgation of substantive laws which are primarily intended to reduce domination. This entails the exposure of a variety of private social relationships characterised by dependency and an arbitrary imbalance in social power to a series of effective and external controls that limit the employer's 'will or pleasure'. As argued above, the employment relationship is one such private nexus which can be characterised by dependency, arbitrariness and a power imbalance. Therefore, the framework advanced by Lovett speaks to labour laws as partially constitutive of a socially just order to the extent that it justifies policy measures that interfere with the arrangements, rights and obligations governing that private relationship. Where a contract is the foundation of that social relationship – as in the case of employment – the effect

³⁴ This reform blueprint is based on converting a 'strategic social relationship' to a 'parametric' relationship in Lovett's scheme, i.e. a relationship between employers and employees that is predicated on a labour market that is fully competitive, and where the price of the employee's labour cannot be determined unilaterally by the employer: F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 35. This is fine as far as it goes, but is woefully inadequate and incomplete from a protective perspective.

of Lovett's 'social justice as non-domination' model is that the relevant labour laws which reduce domination are perfectly justified in setting aside or diluting the express terms freely agreed between the parties in their employment contract. In essence, therefore, the claim can be made that Lovett's argument has the capacity to advance the cause of substantive fairness inasmuch as labour laws interfere in the substance of the parties' agreement.³⁵ This establishes a rupture from the doctrine of freedom of contract. For that reason, it is obviously controversial, particularly from the perspective of (1) classical liberals or neoliberals who prize individual autonomy as a fundamental social value, and (2) classical economic orthodoxy which posits that private ordering is more economically efficient than state-sanctioned rules.³⁶

Less controversial, however, is Pettit's conception of non-domination as constitutive of 'freedom'. According to this account, a legal system that is consistent with freedom ought to embed procedural protections for its citizens vertically viz-a-viz the state, but also in respect of private social relationships, e.g. the employer-employee nexus. In the context of private, horizontal social relationships in the workplace, rights affording a degree of voice to contest and exercise control over workplace decision-making are legitimate fair. The requirement for meaningful voice and control translates into rights to information, well as rights to consultation and negotiation with management. If such rights are to be effective, some additional auxiliary support is necessary, such as laws guaranteeing freedom of association³⁷ and the right of workers to combine in solidarity, as well as collective bargaining laws,³⁸ and laws recognising industrial action.³⁹ Legal prescriptions of this kind serve to 'turn up' the level of bargaining power by enhancing the hand of workers in their negotiations with the employer.⁴⁰ In this way, unlike Lovett's formulation of 'non-domination as (social) justice', the substance of the arrangements, rights and obligations that govern an employment relationship are left intact. Rather, the focus is on the conferral of procedural rights which empower workers and strengthen their position when negotiating with their employer on the substance of the terms of any contract. Seen from this perspective, labour laws conferring procedural protections act directly on the power imbalance variable (1) in section 2 above, whilst only indirectly touching on and reducing the dependency and arbitrariness elements (2) and (3) above: the latter two variables are incidentally minimised by virtue of the greater bargaining power afforded to workers. This can be contrasted with labour laws that modify or uproot the substance of the employment relationship, since they tend to act directly on all three of the variables (1), (2) and

³⁵ This is not an argument put forward by Lovett, but can be extrapolated as a suitable policy response from Lovett's framework, i.e. to those situations where a person or employee is subject to what Lovett understands as "domination".

³⁶ O. E. Williamson, "The Lens of Contract: Private Ordering" (2002) 92(2) *American Economic Review* 438. More later on the relationship between neoliberalism and civic republican theory, as well as economic rationalisations of the proper function of labour law.

³⁷ P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, (Cambridge, CUP, 2012) 111.

³⁸ For the links between freedom of association, collective labour law, procedural fairness/justice and Pettit's conception of 'freedom as non-domination', see A. Bogg and C. Estlund, "Freedom of Association and the Right to Contest: Getting Back to Basics", in A. Bogg and T. Novitz (eds.) *Voices at Work: Continuity and Change in the Common Law World* (Oxford, OUP, 2014) 142-162.

³⁹ P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, OUP, 1999) 142-143.

⁴⁰ B. Langille, 'Labour Law's Back Pages' in G. Davidov and B. Langille (eds.), *Boundaries and Frontiers of Labour Law* (Oxford, Hart, 2006) 20.

(3) albeit in varying strengths and degrees. For example, consider unfair dismissal laws which principally act on the arbitrariness factor, with the dependency and power imbalance elements being tuned down to a much lesser extent.

Normative scope and relational coverage

Non-domination theory can assist in identifying the normative scope and relational span of the discipline in the sense of (1) the distinct topics its regulatory footprint ought to cover, and (2) the range of individuals engaged in the personal performance of work who ought to be included within its protective cloak. For example, we can generalise that certain policy areas of labour law such as minimum wage laws, equal pay laws and working time regulations ought to feature in a labour law framework which invokes the conception of ‘justice as non-domination’ as its justificatory essence, since they each function to minimise the opportunities available to an employer to exercise arbitrary power in what is an inherently imbalanced social relationship and where the weaker party, i.e. the employee, is highly dependent on that relationship. As such, these policy areas can be understood as rules, principles and doctrines forged by the common law and shaped by domestic and international legislation which are concerned with the minimisation of the domination exerted by an employer over an employee. By extrapolation, other policy prescriptions that are designed to re-balance the social power dynamic prevailing in relationships between an employer and employee, reduce the level of an employee’s financial, social or psychological dependency on the employer, and/or curtail the arbitrary decision-making wielded by the employer, can also be rationalised under the umbrella of the non-domination model.

Secondly, non-domination theory can be perceived as a technique that provides avenues for informed law reform in the sense of extending the relational protective coverage of labour laws. By focusing on those private and social relationships in which one of the parties is engaged in the personal performance of work and is dependent on a hirer of his/her labour, as well as subject to an arbitrary power imbalance, the non-domination concept has the capacity to open up labour law to the inclusion of individuals and social relationships currently falling outside its remit.⁴¹ In this way, labour law’s relational span is extended. Let us take UK law as a proxy. Here, we can see that the three variables of power imbalance, dependency and arbitrariness outlined as (1), (2) and (3) in section 2 above are generally reflected not only in employment relationships but also in intermediate personal work relationships. Lovett himself recognises⁴² that domination presents itself in varying degrees. So, social working relationships can be set apart from each other, depending on the degree to which these three variables are present.

⁴¹ Of course, whilst this takes labour law in a progressive worker-friendly direction, it may dull the edge off of the claims made by [against?] the discipline: M. Freedland ‘From the Contract of Employment to the Personal Work Nexus’ (2006) 35 *Industrial Law Journal* 1, 28–9 and M. Weiss, ‘Re-Inventing Labour Law?’ in G. Davidov and B. Langille (eds.), *The Idea of Labour Law* (Oxford, OUP, 2011) 48–9.

⁴² F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 120-1.

Of course, the domination framework does not capture one of the key default rules governing the employment relationship in English law, namely its (ostensibly)⁴³ permanent and indefinite character. At face value, this would appear to be a glaring omission in the model. The line of objection here is that there is a fourth variable missing from the domination model, namely ‘permanence’ or ‘long-term-ness’. However, it is suggested that this would be short-sighted, since surely there is a theoretical foundation for labour law to intervene to offset variables (1), (2) and (3) in section 2 above in a short-term discrete contract for the personal performance of work? Consider the ‘gig’ economy, where Uber⁴⁴ workers are engaged in a myriad of assignments of a short-term nature. By modifying Lovett’s formula to insert an additional criterion of ‘permanence’, one is automatically discounting the scope for short-term contracts of such a kind to be characterised by domination. The argument is that there are significant demerits involved in taking such a step and any concerns with Lovett’s formulation can be addressed in a variety of other ways. For example, in comparison with traditional long-term employment relationships, we might decide that such short-term discrete wage-work contracts give rise to a lower level of domination and that as such, weaker or fewer labour laws should be introduced to act directly or indirectly on the power imbalance, dependency and arbitrariness factors outlined as (1), (2) and (3) in section 2 above. Alternatively, a more selective approach could be adopted, with the introduction of labour laws that tackle only one or two of these three factors, e.g. where a short-term contract for the personal performance of work gives rise to extreme levels of dependency, but only has a mild impact on the social or coercive power or arbitrary discretion wielded by the hirer, the labour laws could be tailored to act on that dependency alone. This underscores the point that the in-built flexibility in the domination model offers the capacity for a more discriminating approach to be adopted. Nevertheless, the end result would remain that short-term work-wage engagements that cannot be classified as employment relationships under orthodox common law rules would be considered as overlaid with domination and regulated by labour laws, albeit perhaps in a more diluted form.

Bypassing weaknesses in modern liberal/liberal-contractualist-based justifications for labour laws

Another advantage of advancing non-domination as a rationale for labour law lies in its ability to bypass some of the weaknesses inherent in the standard account of modern liberalism (as a moral and political philosophy) (known as liberal-contractualism) to act as a justificatory driver for labour laws. Modern liberalism adopts the ‘negative’ conception of liberty adhered to by

⁴³ M. Freedland, *The Personal Employment Contract* (Oxford, OUP, 2003) 308 and 315.

⁴⁴ See *Aslam v Uber BV* [2017] IRLR 4.

eminent thinkers such as Mill,⁴⁵ Berlin,⁴⁶ Bentham,⁴⁷ Kant⁴⁸ and Hobbes⁴⁹ who define liberty as ‘freedom from interference’: in order to ensure an individual’s freedom, the state should not sanction laws interfering in that individual’s sphere of action, except in circumstances where non-interference will deprive the liberty of others or result in harm to others. So far so good, but if we transmit the theory of modern liberalism to the field of labour law, we find that it is in fact difficult to justify any labour laws at all. By placing restrictions and conditions on the ability of employers to co-ordinate their labour force, labour laws by their very nature interfere in the property rights of employers and freedom of contract. As such, they constrain managerial freedom. A liberal-contractualist framework of philosophical thought which at once seeks to advocate or justify policies which are redistributive in nature and/or designed to achieve formal or substantive equality, immediately encounters conceptual problems.⁵⁰ Various solutions are offered to this conundrum by modern liberals to promote social and economic rights and redistribution to offset inequalities,⁵¹ but few are wholly convincing.⁵² Classic liberalism – ‘associated with John Locke... Adam Smith... Alexis de Tocqueville... and Friedrich von Hayek... [which] focuses on the idea of limited government, the maintenance of the rule of law, the avoidance of arbitrary and discretionary power, the sanctity of private property and freely made contracts, and the responsibility of individuals for their own fates’⁵³ – also takes issue with such left-leaning modern liberalism: they claim that rather than enhancing freedom, the prescription of modern liberals functions to *reduce* freedom. By redistributing resources away from one group to offset the existence or chance of poverty, hunger, or unemployment suffered by another group, the state’s interference in the freedom of the former group is not offset by the increase in freedom enjoyed by the latter group to generate a positive aggregate level of freedom in the round. Once the interference in the former group’s freedom is put in the scales alongside the increase in the freedom of the latter group, it is not necessarily always the

⁴⁵ Although, Mill did recognise positive duties to counter the scope for political domination: J. S. Mill, *Principles of Political Economy with some of their Applications to Social Philosophy* (1994)[1848], Book V, Chapter XI, “On the Ground and Limits of the *Laissez-Fair* or Non-Interference Principle,” p. 334.

⁴⁶ I. Berlin, “Two Concepts of Liberty” in *Isaiah Berlin, Liberty, Incorporating Four Essays on Liberty*, H. Hardy (ed) (Oxford: Oxford University Press, 2002) 166-181

⁴⁷ *The Works of Jeremy Bentham*, John Bowring, (ed), (London, 1838-1843); Reprinted New York, 1962.

⁴⁸ *The Cambridge Edition of the Works of Immanuel Kant in English* – see the references in the *Critique of Pure Reason*.

⁴⁹ T. Hobbes, *Leviathan*, R. Tuck (ed) (Cambridge, Cambridge University Press, 1991) chapter 21 at page 146..

⁵⁰ See F. Lovett, ‘Domination and Distributive Justice’ (2009) 71 *Journal of Politics* 817, 818, W. Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford, OUP, 1990) 94-96 and 102-161, D. Enoch, ‘Against Public Reason’ in D. Sobel, P. Vallentyne and S. Wall (eds), *Oxford Studies in Political Philosophy*, Volume I (Oxford, OUP, 2015) 123-124, F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 7, A. Ryan, ‘Liberalism’ in R. E. Goodin, P. Pettit and T. Pogge (eds.), *A Companion to Contemporary Political Philosophy*, 2nd edn, Vol. I, (Oxford, Blackwell Publishing, 2007) 364-365 and P. Pettit, ‘Analytical Philosophy’ in R. E. Goodin, P. Pettit and T. Pogge (eds.), *A Companion to Contemporary Political Philosophy*, 2nd edn, Vol. I, (Oxford, Blackwell Publishing, 2007) 14-15.

⁵¹ The ‘difference principle’ posited by Rawls is the most (in)famous: J. Rawls, *A Theory of Justice* (Oxford, OUP, 1972) 61 and 65-83.

⁵² See A. Ryan, ‘Liberalism’ in R. E. Goodin, P. Pettit and T. Pogge (eds.), *A Companion to Contemporary Political Philosophy*, 2nd edn, Vol. I, (Oxford, Blackwell Publishing, 2007) 366-368.

⁵³ A. Ryan, ‘Liberalism’ in R. E. Goodin, P. Pettit and T. Pogge (eds.), *A Companion to Contemporary Political Philosophy*, 2nd edn, Vol. I, (Oxford, Blackwell Publishing, 2007) 368.

case that the latter is greater than the former, which calls into the question the infringement of negative liberty in this way. Furthermore, the approach of the modern liberal gives rise to the danger that a level of resentment and hostility is generated between the favoured and affected group of citizens under such a state-sanctioned redistributive system.

By stressing ‘domination’, the civic republication conception of liberty shifts the focus of enquiry away from non-interference. Rather than freedom being consistent with non-interference, the formulation stresses an absence of domination as constitutive of freedom. Hence, although an employer’s freedom is subject to interference if laws reduce the dependency of an individual on that employer, the power imbalance between those two parties, or the extent of the former’s arbitrary discretion, such a formulation is consistent with a domination-based theory in the context of contemporary civic republication philosophy: ‘freedom under the law’, rather than ‘freedom from the law’. As noted by Laborde:

“... neo-republicanism, [places] liberty at the centre of its theory, but profoundly alter[s] the adjacent concepts to which liberty is connected: not non-interference but the absence of arbitrary interference [and dependency]; not the silence of the laws but the presence of strong laws and institutions; not a minimal state but a protective state; not the freedom of the private individual but the public status of the citizen.”⁵⁴

Unlike modern liberalism, which focuses on whether there are unwarranted laws that limit the interference with the employer’s freedom, the domination formulation instead concentrates on the domination-reducing and freedom-enhancing effects that legal and policy prescriptions have on the individual employee. In this way, civic republicanism shifts the focus away from interference to domination, but also away from the employer to the employee. In essence, the state’s interference in the freedom of the employer does not feature.

The radical difference in approach between modern liberalism and domination theory – and the reason that the impact of labour laws on the employer’s freedom is largely irrelevant – can be illustrated with an example. By compelling employers to tone down the level of their arbitrary power, reducing an employee’s dependency on their employer or re-balancing the power disparity in the employment relationship enjoyed by an employer, labour laws clearly interfere in the negative liberty of employers. Under liberal theory, that intervention can only be justified to the extent that any increase in the liberty of others outweighs the reduction in the freedom of the employer generated by those labour laws. Here, there is an approximate calculation or judgment that must be made. However, contrast this with domination theory, which has a clear advantage over classic liberalism or liberal-contractualism. When the state intervenes in this way, the employer remains free from domination by the state: whilst the arbitrary power of the state over the employer may increase, the employer remains free from any dependency on the state, since the employer’s exit costs vis-à-vis any vertical relationship it may have with the state are unlikely to increase by the introduction of labour laws and it can still spread its risks. What is particularly key is that the balancing exercise required under

⁵⁴ C. Laborde, ‘Republicanism’ in M. Freeden, L. T. Sargent and M. Stears, *The Oxford Handbook of Political Ideologies* (Oxford, OUP, 2013) 525.

liberalism does not enter into the equation under the domination framework: it is only if the employer is dominated by the state that any theoretical problem is generated by the intervention of labour law.

The benefits of promoting a political foundation for labour laws

An additional strength of the non-domination model is partially connected to that discussed in the preceding paragraph, i.e. concerning its relationship to liberal theory. This underscores the point that the non-domination strand of civic republican philosophy advances a politically grounded justification for labour law which speaks to the construction of a set of principles that embody a countervailing force to the private coercive power inherent in the employment relationship. Such a political foundation for the subject acts as a bulwark to an economic or market-based rationalisation for labour law's constituting narrative⁵⁵ which occasionally gives the impression of being impervious to democratically sanctioned controls. One of the perils of advancing economic justifications for the subject is that neoclassical economic approaches end up colonising the debate surrounding whether labour laws ought to be adopted. The institutional economic approach of Keynes has given way to the neo-classical economic vision of Friedman and Hayek in recent times and this neoclassical school shares many affinities with the classic strand of liberalism in political philosophy, whose more modern offshoot is referred to as 'neoliberalism'. The neoliberal political philosophy is essentially grounded in the Hayekian conception of liberalism as 'freedom from coercion',⁵⁶ and pursues an agenda which promotes the proliferation of unrestricted markets, individual freedom, private autonomy and power, small government and few, if any, social protections. It is a modernised and refined version of the classic liberalist school of thought. Labour laws are subject to regular neoliberal and neoclassical economic assaults based on this idea of 'freedom from coercion'. Since the small print of domination-based reasoning stresses the dampening down of employee dependency and the minimisation of arbitrary social and coercive power, it contains elements which can have a chilling effect on challenges to its legitimacy which originate from the direction of neoliberal and neoclassical economic thought. The similar terminology adopted by civic republicans is particularly unsettling for the adherents of the neoliberal ideology: if a social and legal order – such as labour law – is legitimate and truly liberal insofar as it secures non-coercion in the lives of its employee citizens, then according to the neoliberal approach, the theoretical account of social justice as an absence of domination should be difficult to rebut. In this way, labour laws designed to promote a measure of distributive justice and equal opportunities can be cast as a form of social justice in reducing the degree of coercion enjoyed by the employer which is a legitimate endeavour consistent with freedom. The non-domination framework also has the attraction of subordinating the economic to the political in the sense that it recognises the central role of politics to descriptive and normative accounts of labour

⁵⁵ B. Langille, 'Labour Law's Back Pages' in G. Davidov and B. Langille (eds), *Boundaries and Frontiers of Labour Law* (Oxford, Hart, 2006) 14-17.

⁵⁶ See F. A. Hayek, *The Constitution of Liberty* (London and New York, Routledge Classics, 2006) 16-20 and C. Laborde, 'Republicanism' in M. Freedman, L. T. Sargent and M. Stears, *The Oxford Handbook of Political Ideologies* (Oxford, OUP, 2013) 530-531.

law. In the same way, the economic logic of the market is afforded less priority than the democratic.⁵⁷

Focus on an employment relationship, as well as the labour market generally

Like all markets, the labour market is subject to market failures. Contract law, and specialised areas of contract law, such as consumer law, will address these generic imperfections in the market. Labour laws are occasionally justified in such generic terms. In other words, that labour law is designed to ‘cure’, eradicate or curtail such imperfections in the labour market. Indeed, that is the underlying premise of the ‘law of the labour market’ account of labour laws. This formulation stresses the role of labour laws in addressing market failures generated by imperfect information, transaction costs, the absence of full rationality in the behaviour of the average employer and employee in an employment relationship, barriers to entry and exit to the average employment relationship, as well as opportunistic and coercive behaviour.

Of course, it is true up to a point that labour laws can be conceived in these abstract terms. But it does not capture the full picture, since it is ‘very difficult to make a more concrete connection between existing [specific] labour laws and concrete market failures’.⁵⁸ Indeed, many labour laws are concerned with the eradication of employment relationship-specific failures rather than the labour market in general. In other words, imperfections in a market exchange that are particular to a specific bilateral employment relationship. This point is illustrated if our attention moves to the operation of the proportionality test in workplace indirect discrimination cases. The self-modulating character – in its content and functioning – of this standard of review suggests that it harbours an abiding preoccupation with specific employment contracts: if the degree of harm suffered by an employee on the basis of a protected characteristic (such as race, sex, disability, etc.) is severe, then if the employer wishes to escape liability, the more acute and pressing its need must be to apply the relevant provision, criterion or practice to achieve the proffered legitimate aim.⁵⁹ The fact that the standard that the employer requires to discharge eases in proportion to any fall in the degree of harm experienced by the employee simply drives the point home: that as well as governing the operation of employment relationships in the abstract, labour law also governs their particularities.⁶⁰

⁵⁷ To that extent, theories of non-domination share certain characteristics with reformulations of the discipline of labour law in terms of the labour constitution, i.e. that ‘politics matters’, in contrast to the assertion that ‘economics matters’ by underscoring the inherently political features of labour laws: R. Dukes, *The Labour Constitution* (Oxford, OUP, 2015).

⁵⁸ G. Davidov, *A Purposive Approach to Labour Law* (Oxford, OUP, 2016) 51. Davidov argues this point by reference to labour legislation which gives workers the benefit of ‘ten vacation days’ and a nine-hour limit on daily working time. In other words, why ten days and not fourteen days, and why nine hours instead of ten hours?

⁵⁹ For example, in UK law, see *Hampson v Department of Education and Science* [1990] 2 All ER 25, *Barry v Midland Bank* [1999] 3 All ER 974, 984e-986g per Lord Nicholls and *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, 3246B-3251E per Lord Justice Mummery.

⁶⁰ The argument is not being presented here, however, that all laws particular to employment law may be characterised as concerned with the correction of employment relationship-specific failures. For example, as the National minimum wage as a legal concept is particular to employment law, but can be treated as a law that is dedicated to addressing general failures in the labour market.

But what is the relevance of this discussion to Lovett's non-domination account in civic republican philosophy? Fundamentally, what is striking about non-domination is its ability to provide a degree of conceptual ballast for the legal techniques in labour law which regulate particular employment relationships on a context-specific basis, rather than generic employment relationships in the labour market, i.e. standards of review in labour law.⁶¹ The point to be made here is that there is a link between (1) the theory's relational concern for the minimisation of domination in individual private arrangements, (2) the labour law techniques adopted in respect of the regulation of individual employment relationships and (3) self-modulating standards of review of managerial behaviour in labour law. For example, the link between factors (1) – (3) is brought clearly into focus in the context of the proportionality standard of review in indirect discrimination law which renders practices of the employer unlawful if they have a disparate adverse impact on certain persons, unless objectively justifiable. Likewise in the case of the 'range of reasonable responses' standard of review in the law of unfair dismissal in UK law, which specifically enjoins employment tribunals and courts to take into account the size of the employer and administrative resources available to it when evaluating whether its decision to dismiss was reasonable in the circumstances.⁶² Here, the case law endorses the application of a heightened concentration of scrutiny in terms of the range of reasonable responses test where the consequences of a misconduct dismissal for the employee are particularly serious and grave.⁶³ The same 'self-modulating norms' point can be made about the common law implied term of mutual trust and confidence in UK law, inasmuch as in certain circumstances, its 'bite' will vary according to the employment relationship concerned, rather than by reference to the labour market in general. For example, from employer to employer, there will be variations in the nature of an employee's legitimate expectations that will be protected pursuant to the implied term, as in the case of what constitutes 'reasonable' notice in the context of that term's control of mobility clauses in employment contracts.⁶⁴ Seen from this perspective, the modest claim can be made that the domination approach can be used to justify self-modulating labour law norms and standards of managerial review, by enlarging a worker's freedom in one employment relationship more rigorously – where that is required - than in another employment relationship.

4. Some objections to the Domination-based account

⁶¹ See D. Cabrelli, "The Hierarchy of Differing Behavioural Standards of Review in Labour Law" (2011) 40 *Industrial Law Journal* 146, D. Cabrelli, "Rules and Standards in the Workplace: A Perspective from the field of Labour Law" (2011) 31(1) *Legal Studies* 21, and G. Davidov, *A Purposive Approach to Labour Law* (Oxford, OUP, 2016) 163-196, Alon-Shenker and G. Davidov, "Applying the Principle of Proportionality in Employment and Labour Law Contexts" (2013) 59 *McGill Law Journal* 375 and G. Davidov, "The Principle of Proportionality in Labor Law and its Impact on Precarious Workers" (2012) 34 *Comparative Labor Law & Policy Journal* 63.

⁶² Employment Rights Act 1996, s. 98(4).

⁶³ *A v B* [2003] IRLR 405, *Salford Royal NHS Foundation Trust v Roldan* [2010] ICR 1457 and *Turner v East Midland Trains Ltd.* [2013] ICR 525, 541C-E per Elias LJ.

⁶⁴ For a broader discussion and additional examples of the variable intensity of scrutiny associated with the implied term of mutual trust and confidence, see A. Bogg, '*Bournemouth University Higher Education Corporation v Buckland*: Re-establishing Orthodoxy at the Expense of Coherence?' (2010) 39 *Industrial Law Journal* 408, 415-417.

Notwithstanding the merits of the factors discussed in section 3, there are a number of objections,⁶⁵ which taken cumulatively, suggest that the non-domination strand of civic republican theory may be insufficient to act as a general justification for labour laws. Instead, with various caveats and modifications, the proposition is advanced that different strands of non-domination (e.g. Pettit as well as Lovett's approach) can be adopted to advance a foundation for specific labour laws only, a brief flavour of which will be sketched out in the concluding section. Hence, on balance, whilst some of the objections to the domination account can be contested, taken as a whole, the criticisms are of sufficient substance to outweigh any claim it may purport to make to be a comprehensive and normative basis for the subject.

Too individualistic and relational

A line of objection to the domination-based construct is that it unduly stresses individualism and autonomy-based conceptions as foundations for the subject of labour law at the expense of its traditional roots in collectivism and solidarity. A closely connected charge is that the theory is excessively rooted in bilateral relationships⁶⁶ and thus fails to account for structural disadvantages and group or economic subordination experienced by employees as a result of the basic composition and operation of the labour market.⁶⁷ This point is twofold. First, that Pettit's and Lovett's models are far too much rooted on the individual to be useful as a theory for labour law which is collective/solidaristic in nature.⁶⁸ Both discount the possibility of domination in an agentless context. Secondly, that its relational core reduces its relevance as a basis for labour laws insofar as it cannot account for laws tackling the group/economic subordination and structural dependency experienced by employees generally in the market. In other words, that it has little scope to explain labour laws that seek to relieve the reliance of employees on wage labour for subsistence and a living and the structural disparity in the distribution of resources between employers and employees in the marketplace, which are by and large "external" to the specific private law bargain they have struck.

Taken at face value, the various texts may make it seem straightforward to rebut these criticisms. For example, it has been argued that the civic republican tradition embeds a

⁶⁵ Section 4 is not intended to supply an exhaustive account of every objection. For example, the accusation that latching on to the civic republican philosophy is simply another attempt to re-market labour law and shield it from the challenges it faces, is not addressed here. For a comprehensive note of the various criticisms, see G. Davidov, "Subordination v Domination: Exploring the Differences" (2017) [x] *International Journal of Labour Law and Industrial Relations* [x] and A. Bogg, "Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?" (2017) [x] *International Journal of Comparative Labour Law and Industrial Relations* [xxx].

⁶⁶ See the discussion in F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 47-49 and P. Pettit, "Freedom in the Market" (2006) 5 *Politics, Philosophy and Economics* 131, 138-140.

⁶⁷ See G. Davidov, "Subordination v Domination: Exploring the Differences" (2017) [x] *International Journal of Labour Law and Industrial Relations* [x].

⁶⁸ For some reflections on this issue from the perspective of political theory, see the distinction drawn between social atomism/individualism and holism/collectivism in P. Pettit, 'Analytical Philosophy' in R. E. Goodin, P. Pettit and T. Pogge (eds.), *A Companion to Contemporary Political Philosophy*, 2nd edn, Vol. I, (Oxford, Blackwell Publishing, 2007) 26-27.

pluralistic and collectivist identitarian philosophy not unlike some of the hallmarks of the communitarian criticism of mainstream liberalism.⁶⁹ For example, civic republicanism:

“relie[s], instead, on pride in shared institutions and practices, insofar as these promoted democracy, freedom, and equality... [including a] sense of collective identity and of shared purposes emerg[ing] from participation in common life, rather than being pre-requisites for it... [i]t is no surprise, therefore, that high-profile communitarian philosophers, such as Charles Taylor (1989) and Michael Sandel (1996) had by the early 1990s professed allegiance to republicanism, and went on greatly to contribute to its development.”⁷⁰

Laborde explores this point, noting that Pettit’s conception of civic republicanism allies it to ‘progressive causes such as workers’ rights, [and] women’s rights.’⁷¹ Dagger builds on this idea when he posits that in the republican civic economy, the nature and conditions of work in the workplace will be taken seriously, to the extent that losses in efficiency in the context of trades of goods and services in the economy will be absorbed and tolerated ‘when necessary to make work more conducive to self-governing citizenship’.⁷² Pettit points out that measures must be put in place to limit or control the power of the employer to fire at will, thus necessitating more formal and meaningful legal interference into the common law unrestricted reasonable notice rule,⁷³ e.g. by recourse to ‘just cause’ rules.⁷⁴ Building on these points, one can envisage a civic-republican domination-based account of employment law as providing strong support for the emergence of collective rights as a centre of countervailing power to employers that would enable the domination existing in individual employment relationships to be dented. Furthermore, democratic control of the workplace through collective rights could be validated under the domination framework.

Having said all this, under Lovett’s and Pettit’s normative schemes for minimising domination, whilst legitimized by the republican non-domination construct, the case for various collective freedoms such as the freedoms of assembly and association together with

⁶⁹ C. Laborde, ‘Republicanism’ in M. Freeden, L. T. Sargent and M. Stears, *The Oxford Handbook of Political Ideologies* (Oxford, OUP, 2013) 516.

⁷⁰ C. Laborde, ‘Republicanism’ in M. Freeden, L. T. Sargent and M. Stears, *The Oxford Handbook of Political Ideologies* (Oxford, OUP, 2013) 516. See also A. Ryan, ‘Liberalism’ in R. E. Goodin, P. Pettit and T. Pogge (eds.), *A Companion to Contemporary Political Philosophy*, 2nd edn, Vol. I, (Oxford, Blackwell Publishing, 2007) 361-362.

⁷¹ C. Laborde, ‘Republicanism’ in M. Freeden, L. T. Sargent and M. Stears, *The Oxford Handbook of Political Ideologies* (Oxford, OUP, 2013) 520.

⁷² R. Dagger, ‘Neo-republicanism and the civic economy’ (2006) 5 *Politics, Philosophy and Economics* 151, 162.

⁷³ P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, OUP, 1997) 141-142, P. Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy*, (Cambridge, CUP, 2012) 115, and R. Dagger, ‘Neo-republicanism and the civic economy’ (2006) 5 *Politics, Philosophy and Economics* 151, 162.

⁷⁴ For the possibilities, see G. Davidov and E. Eshet, ‘Intermediate Approaches to Unfair Dismissal Protection’ (2015) 44 *Industrial Law Journal* 167; G. Davidov, ‘In Defence of (Efficiently Administered) ‘Just Cause’ Dismissal Laws’ (2007) 23 *International Journal of Comparative Labour Law and Industrial Relations* 117; and J. Howe, ‘Poles Apart? The Contestation Between the Ideas of No Fault Dismissal and Unfair Dismissal for Protecting Job Security’ (2013) 42 *Industrial Law Journal* 122.

state protection and recognition for trade unions and collective bargaining,⁷⁵ is extremely weak. In addition, the interpersonal, bilateral and relational nature of the non-structural account of domination in Pettit's and Lovett's formulation renders it impracticable to target market or social inequalities at the collective level of labour laws. Admittedly, Pettit recognises the merits of collective action in certain circumstances when this serves to "wrest workers from under the spectre of destitution".⁷⁶ However, such a justification is hardly entirely supportive of collective bargaining and fails to act as a driver for anything other than the status quo in the context of UK collective labour law. It underplays and undermines the role of collective bargaining and the collective protection of workers since at the very core of the neo-republican account of domination rests the denial that disparities in the underlying distribution of property or various features of the labour market can of themselves, give rise to domination. According to their formulation, they are agnostic (possibly hostile) about legal intervention where the effects of the labour market and property system – just like the natural environment – are inequalitarian in outcome, or warrant concern, since such markets and patterns of distribution cannot be a source of domination. And if there is no domination, there is no justification for law or regulation since individuals are free and the social order is just. Owing to the fact that collective labour laws are generally justified on the ground that the challenges experienced by workers as a class are socially and market-constituted,⁷⁷ rather than rooted in a series of individual interpersonal relationships between workers and their employers, this opens up clear deficits in the ability of neo-republican domination to act as a base for collective bargaining laws, industrial action laws and freedom of association.

Overall, these objections to the domination-based model which criticise its individualistic and relational nature have a great deal of merit inasmuch as they each speak to the argument that it can only account for certain kinds of labour laws at best. This underscores the mismatch between the collectivist origins of the subject and the non-domination civic republicans. This absence of fit is essentially attributable to the lack of structural base to domination theory, which is a cornerstone of other civic republican accounts advanced by commentators such as Gourevitch;⁷⁸ and it evokes the distinct impression that Lovett's and Pettit's model can only act as a justificatory basis for individual and relational laws.

Too selective as a general justification

A second criticism of the non-domination account is that it may be too 'selective' a goal for labour law. To put this point in perspective, Davidov⁷⁹ divides the range of potential

⁷⁵ Pettit casts these as 'options' that ought to be 'screened in': P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, (Cambridge, CUP, 2012) 115.

⁷⁶ P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, OUP, 1997) 142.

⁷⁷ P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law*, 3rd edition (London, Stevens, 1983) 17.

⁷⁸ A. Gourevitch, 'Labor and republican liberty' (2011) 18 (3) *Constellations* 431, A. Gourevitch, 'Labor republicanism and the transformation of work' (2013) 41 (4) *Political Theory* 591, 599-609 and A. Gourevitch, "Quitting Work But Not the Job: Liberty and the Right to Strike" (2016) 14(2) *Perspectives on Politics* 307, 312-315.

⁷⁹ G. Davidov, *A Purposive Approach to Labour Law* (Oxford, OUP, 2016) 69-70.

objectives for labour law into a spectrum with ‘selective’ goals at the worker-protective end, and those which are ‘universal’ at the other. Selective goals promote the interests of workers only, whereas universal goals are concerned with regulatory intervention where it is of benefit for all groups, such as employers as well as employees, and society in general. Non-domination is ‘selective’ in nature⁸⁰ for two reasons: first, as explained above, it is sufficiently nuanced to advance the case for laws targeting employment relationship-specific failures as well as general labour market imperfections; and secondly, it condones labour laws prioritising the interests of workers over broader societal considerations. The line of objection here is that the adoption of selective goals for labour laws such as ‘domination’ has the potential to craft a rigid justificatory pillar for the discipline which is unresponsive to changes in underlying social, economic and political conditions. The danger is that it creates an inability to move with the times, so that the basis of the subject becomes irrelevant. This can be contrasted with universalist justifications that are more flexible in orientation such as the ‘law of the labour market’ construct which are more likely to command much broader public backing and less likely to be captured by sectional interests. For this reason, it is argued that such broad-based factors are preferable as a hinge upon which to justify labour laws.

One can respond to this charge by arguing that the domination framework does not exclusively focus on the promotion of laws that are good for employees, but also includes certain goals such as democratic deliberative decision-making secured through procedural labour rights. Labour laws conferring procedural protections on dismissal/redundancy can be supported on the basis of non-domination theory. These afford a certain degree of procedural fairness in favour of workers by enabling them to contest and control workplace decisions affecting them in an individual capacity. However, they also enhance democratic participation by incentivising a degree of self-governance in the workplace. For this reason, non-domination can be cast as a ‘mid-spectrum’ objective,⁸¹ concerned at once with the protection of workers as well as wider concerns, such as the advancement of democratic participation in the workplace.

Free consent

The third criticism of the non-domination theory is based on the concept of free consent, i.e. that the wage-dependent labourer, having submitted to a state of domination and traded independence in return for income security and continuity of work,⁸² must accept his/her lot. This raises the question as to why (and whether) the law should step in to protect him/her. An argument based on free consent posits that the worker’s freely given consent to domination is sufficient to relieve the state from passing protective laws.⁸³ Despite the elegance of this simple logic, the ‘consent’ objection assumes two things: first, that ‘consent’ is freely given. This

⁸⁰ It could be argued that non-domination is too universal as a goal owing to its broadly political character, but on balance, albeit political, its ultimate aims are to strengthen the hand of the weaker party to a bilateral social relationship, which will invariably be the employee in the case of employment.

⁸¹ See the discussion in L. Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (Cheltenham, Edward Elgar, 2016) 41-45 and 92-93.

⁸² See Herbert Simon, H. Simon, ‘A formal theory of the employment relation’ (1951) 19 *Econometrica* 293–305 and G. Davidov, *A Purposive Approach to Labour Law* (Oxford, OUP, 2016) 103-107.

⁸³ The ‘consent’ objection is also a challenge for liberal-contractualists and neoliberals alike.

assumption neglects to factor in the general reliance of employees on wage labour for subsistence (so an absence of true and ‘free’ choice as to whether to accept employment). Second, the ‘consent’ objection assumes a perfectly competitive labour where the employer is as dependent on the employee as the employee is on the employer, with the employee having the luxury of effortless diversification of his/her economic risks and minimal costs of exiting the employment relationship. Of course, this is a fantasy, studies having suggested the impracticability of constructing a real-life labour market such as this.⁸⁴ As such, although the common law in the UK supports the employee’s freedom to quit⁸⁵ and freedom of contract⁸⁶ (for optimal express terms), his/her consent is essentially an illusion, masking his/her individual and structural dependency and subordination, as well as the economic necessity of work. In this way, as noted by Collins,⁸⁷ there is a case to be made for the proposition that the worker’s consent is vitiated.

The transplantability of non-domination

The fourth objection relates to the transplantability of the non-domination theory and its use as a justificatory account for labour law. Civic republican theories have their origin in the justification of concepts, constructs and institutions which enable citizens to act as free, undominated persons. The primary concerns of political philosophers are thus with justice and freedom, which are not normally the central concerns or aims of labour law. Allied to this is the fact that political philosophers assume a contrived ‘natural state’ or ‘original position’ with no laws or power dynamics in place which can then serve as a template within which to construct ideals of freedom and justice. The rationale for labour law starts from a different premise: in its ‘natural state’, the employment relationship is characterised by an inherent power imbalance and labour laws tend to be designed with the objective of minimising this disparity in mind. The concept of ‘domination’ may not be the most appropriate word to describe the hierarchical employment relationship which is based on authority, co-operation and bureaucratic power, i.e. a more subtle and nuanced set of workplace interactions⁸⁸ than what is envisaged under Pettit’s⁸⁹ and Lovett’s schemes. The use of the language of political

⁸⁴ B. E. Kaufman, ‘The Impossibility of a Perfectly Competitive Labour Market’ (2007) 31 *Cambridge Journal of Economics* 775.

⁸⁵ *Nokes v Doncaster Amalgamated Collieries Ltd.* [1940] AC 1014; *Howard Johnson Co. v Detroit Local Joint Executive Board* 417 US 249 (1974) and *National Labor Relations Board v Burns International Security Services Inc.*, 406 US 272 (1972). For a distinction between employment as an institution and slavery, forced labour, servitude and serfdom, see A. Bogg and C. Estlund, ‘Freedom of Association and the Right to Contest: Getting Back to Basics’ in A. Bogg and T. Novitz (eds.), *Voices at Work: Continuity and Change in the Common Law World* (Oxford, OUP, 2014) 141, 151-162.

⁸⁶ Kahn-Freund famously identifying the freedom of contract as a kind of legal fiction: P. Davies and M. Freedland (eds.), *Kahn-Freund’s Labour and the Law*, 3rd edition (London, Stevens, 1983) 18.

⁸⁷ H. Collins, ‘Labour is not an Instrument: Is the Contract of Employment Compatible with Liberalism?’ in H. Collins and V. Mantouvalou, (eds.) *Philosophical Foundations of Labour Law* (Oxford, OUP, forthcoming).

⁸⁸ Hugh Collins, ‘Market Power, Bureaucratic Power, and the Contract of Employment (1986) 15 *Industrial Law Journal* 1 and H. Collins, ‘Against Abstentionism in Labour Law’ in J. Eekelaar & J. Bell (eds.), *Oxford Essays in Jurisprudence* (Oxford, OUP, 1987) 79, 92-100.

⁸⁹ Pettit captures this in the idea of ‘strategic deference’, which only underscores the point that there is not a precise match between domination and subordination: P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, OUP, 1999) 80, 86-87.

philosophy and its application to labour law is thus a process riddled with difficulties due to this difference in discourse. This is a valid objection and, taken together with the other criticisms versed above, makes it difficult to see how the non-domination theory can serve as a universal justificatory account for labour law as a subject. However, the theory, bearing in mind its different starting point and aims, is nonetheless attractive in that the main ideas underpinning civic republicanism – freedom as non-domination, a mixed constitution and the contestatory citizenry – are ideals which can act as a driver for specific labour laws and more specifically for a particular set of labour laws that seek to further a distinctive set of regulatory objectives.

5. Conclusion

As noted in the introduction, ‘domination’ theory in civic republican thought can supply a link between accounts of the law of the contract of employment⁹⁰ and political philosophy. Whilst the authors reject Lovett’s and Pettit’s techniques for the reduction of domination as impoverished, their descriptive account of private relations imbued with domination is accepted (subject to modifications) as a useful basis on which to build a basis for legal intervention in the employment relationship. This new, but restricted ‘normativity’ has the potential to justify labour laws of a particular kind, the shape, nature and character of that set of legal responses amounting to something that we aim to plot in greater detail in a future paper. However, if we were to distil the salient features of that scheme, and to draw out the various points emerging from the preceding discussion in sections 3 and 4, we can arrive at a normative case for a series of labour laws that are avowedly (i) individual, rather than collective in their configuration, (ii) relational, rather than structural in nature insofar as they focus on tackling the vulnerabilities experienced by individual employees to specific employment relationships, (iii) autonomous rather than dependent on contract, (iv) specific and selective, rather than general or universal in their orientation, and (v) at once substantive and (mildly) procedural. In the next paper, we intend to chart how these features can be fed in to a framework for the regulation of the law of the contract of employment.

⁹⁰ D. Brodie, ‘How Relational is the Employment Contract?’ (2011) 40 *Industrial Law Journal* 232 and D. Brodie, ‘Relational Contracts’ in M. Freedland et al (eds), *The Contract of Employment* (Oxford, OUP, 2016) 145